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 Vincent Fremont, Vincent Fremont Enterprises, and The Andy Warhol  
 Art Authentication Board, Inc.*

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

|   |   |                                  |
|---|---|----------------------------------|
| -----                                       | X |                                  |
| JOE SIMON-WHELAN, Individually and on       | : | Index No. 07 CV 6423 (LTS) (AJP) |
| Behalf of All Others Similarly Situated,    | : |                                  |
|   | : | <u>ECF CASE</u>                  |
| Plaintiff,                                  | : |                                  |
|   | : |                                  |
| - against -                                 | : |                                  |
|   | : |                                  |
| THE ANDY WARHOL FOUNDATION FOR              | : |                                  |
| THE VISUAL ARTS, INC., THE ESTATE OF        | : |                                  |
| ANDY WARHOL, VINCENT FREMONT,               | : | <b>DECLARATION OF</b>            |
| Individually and Successor Executor for the | : | <b>GARY D. SESSER IN SUPPORT</b> |
| Estate of Andy Warhol, VINCENT FREMONT      | : | <b>OF MOTION TO DISMISS THE</b>  |
| ENTERPRISES, THE ANDY WARHOL ART            | : | <b><u>AMENDED COMPLAINT</u></b>  |
| AUTHENTICATION BOARD, INC., JOHN            | : |                                  |
| DOES 1-20, JANE DOES 1-10, and RICHARD      | : |                                  |
| ROES 1-10,                                  | : |                                  |
|   | : |                                  |
| Defendants.                                 | : |                                  |
| -----                                       | X |                                  |

Gary D. Sesser hereby declares, under penalty of perjury, that the following is true and correct:

1. I am a member of the law firm of Carter Ledyard & Milburn LLP, attorneys for Defendants The Andy Warhol Foundation for the Visual Arts, Inc.; Vincent Fremont; Vincent Fremont Enterprises; and The Andy Warhol Art Authentication Board, Inc. ("Defendants"). I submit this declaration in support of Defendants' motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. This motion is filed pursuant to a Stipulation and Order signed by this Court on September 24, 2007, attached as **Exhibit A**, in which Defendants withdrew their motion to dismiss the original Complaint and Plaintiff was permitted to file an Amended Complaint on or before October 19, 2007. The September 24 Stipulation and Order sets forth a schedule and page limits for this motion to dismiss, including a filing deadline of November 30, 2007 and a 45-page limit for Defendants' memorandum of law in support of its motion to dismiss the Amended Complaint.

3. Attached as **Exhibit B** is a true and correct copy of the letter, dated May 18, 2004, from The Andy Warhol Art Authentication Board, Inc. (the "Board") to Joe Simon-Whelan ("Simon"). As Defendants pointed out in their motion to dismiss the original Complaint, this letter was attached in a barely legible form as Exhibit E to the Complaint and was materially misquoted. The Amended Complaint attaches the same barely legible version, and continues to misquote the letter of explanation as stating that "[t]he only aspect of the self-portraits that Warhol made in early 1964 that is *painted* is the black silkscreen impression" and that "as part of its research, the Board learned that the work you submitted and the nine identical examples were *painted* by a commercial printer in 1965." Am. Compl. ¶169 (emphasis supplied). The letter attached hereto as Exhibit A in fact refers to these portions of Simon's work and the identical examples as being "printed," not "painted."

4. Attached as **Exhibit C** is a true and correct copy of the New York State amended certificate of incorporation for The Andy Warhol Foundation for the Visual Arts, Inc. (the "Foundation"), as amended and approved on February 5, 1988, which sets forth the Foundation's charitable purpose. Certificates of incorporation are publicly available from the New York State Department of State, Division of Corporations.

5. Attached as **Exhibit D** is a true and correct copy of a Certificate of Letters Testamentary issued by the Surrogate's Court of the County of New York on November 15, 2007, stating that "on April 1, 1987 ... LETTERS TESTAMENTARY on the estate of Andy Warhol ... were granted unto Frederick Hughes ... and that it does not appear by said records that letters have been revoked" (emphasis in original).

6. Attached as **Exhibit E** is a true and correct copy of the article by Michael Schnayerson entitled "Judging Andy" that appeared in the November 2003 issue of *Vanity Fair*. This article is cited and relied upon in the Amended Complaint at ¶¶22, 80, 82, 86, and 167.

7. Attached as **Exhibit F** is a true and correct copy of the article by Kelly Devine Thomas entitled "Authenticating Andy" that appeared in the September 2004 issue of *ARTnews*, Sept. 2004. This article is cited and relied upon in the Amended Complaint at ¶¶82, 85.

8. Attached as **Exhibit G** is a true and correct copy of pages 15-23 and 218-234, excerpted from the book by Richard Polsky entitled *I Bought Andy Warhol*. This book is cited and relied upon in the Amended Complaint at ¶¶114, 132.

9. Attached as **Exhibit H** is a true and correct copy of the article by Tyler Maroney entitled "Much More Than Fifteen Minutes" that appeared in *ARTnews* in January 2002. This article is cited and relied upon in the Amended Complaint at ¶215.

10. Attached as **Exhibit I** is a true and correct copy of the article by James Morrison entitled "One in Six Original Warhols is a Copy" that appeared in *The Independent* on October 26, 2003. This article is cited and relied upon in the Amended Complaint at ¶182.

11. Attached as **Exhibit J** is a true and correct copy of the article by Jason Edward Kaufman entitled "Challenge to the Andy Warhol Authentication Board" that appeared in *The*

*Art Newspaper* for October 2003. This article is cited as the source of the Simon quotation in the article from *The Independent* referenced above in ¶11 and in the Amended Complaint at ¶182.

12. Attached as **Exhibit K** is a true and correct copy of the title page and index of the catalogue raisonné of Andy Warhol's paintings and sculpture. The painting and sculpture catalogue raisonné is a publication available to the general public and accessible at public libraries (including the New York Public Library), which lists all known authentic Warhol paintings and sculpture created from 1961 through 1969; works created before 1961 and after 1969 are to be addressed in future volumes. The index attached hereto lists 2,110 Warhol works that are included in volumes 1, 2A, and 2B of the painting and sculpture catalogue raisonné, each with a unique catalogue number, and for many works, the name of the owner of the work. 1 *Andy Warhol Catalogue Raisonné: Paintings and Sculpture 1961–1963* (Georg Frei & Neil Printz eds., 2001); 2A–2B *Andy Warhol Catalogue Raisonné: Paintings and Sculpture 1964–1969* (Georg Frei & Neil Printz eds., Sally King-Nero exec. ed., 2004). The paintings entitled *Green Car Crash*, also known as *Green Burning Car 1* cited in the Amended Complaint at paragraphs 2 and 12, and *Lemon Marilyn* cited in paragraph 2, are included in the painting and sculpture catalogue raisonné at catalogue numbers 425 and 255, respectively. Contrary to the implication in the Amended Complaint, Vincent Fremont is not among the editors of the painting and sculpture catalogue raisonné. See Amended Complaint ¶150 (“Fremont also advised Plaintiff that Double Denied was appropriate for photograph [sic] and inclusion in the Warhol Catalogue Raisonné”). The catalogue raisonné is referred to in the Amended Complaint at ¶¶ 12, 17, 65, 70, 87, 119, 145, 150, 225, and 237.

13. Attached as **Exhibit L** is a true and correct copy of the title page from the catalogue raisonné of Warhol prints and an excerpt listing “published prints.” The print

catalogue raisonné is a publication available to the general public and accessible at public libraries (including the New York Public Library), which lists all known authentic Warhol prints. The chapter attached hereto identifies approximately 80,000 published prints, which are usually signed and numbered; other chapters identify representative examples of Warhol's unpublished prints, which include personal projects, commissioned projects, and portraits. *Andy Warhol Prints: A Catalogue Raisonné 1962–1987* (Frayda Feldman & Jorg Schellman eds., 4th ed. 2003) (revised and expanded by Frayda Feldman and Claudia Defendi).

14. Attached as **Exhibit M** are excerpts from the Christie's catalog from the May 16, 2007 Post-War and Contemporary Art auction at which *Green Car Crash* and *Lemon Marilyn* were sold, as noted in Amended Complaint paragraphs 2 and 12, listing information for all Warhol works offered for sale. Works reviewed by the Andy Warhol Art Authentication Board are stamped and marked with an opinion number. Works listed in the painting and sculpture catalogue raisonné have a catalogue raisonné number. Some Warhol works offered for sale in the May 16, 2007 catalog have a Board opinion stamp and a catalogue raisonné number or page listed (p. 60), some have only a catalogue raisonné number or page listed (pp. 64, 80, 106, 168, 212, 218), and some have *neither* a Board opinion stamp *nor* a catalogue raisonné number or page listed (p. 256, 262). One work is listed with an Estate stamp and number and no catalogue raisonné number or page. (p. 278). The *Green Car Crash* and *Lemon Marilyn* are among those that have a catalogue raisonné number and page but no Board opinion stamp or number listed, indicating that these works had *not* been reviewed by the Board. pp. 64, 80.

15. Tax returns for the Foundation, submitted on Internal Revenue Service Form 990-PF, are made publicly available pursuant to the requirements of 26 U.S.C. § 6104(d). Tax returns for the Foundation for the last six years are available at no charge on the Foundation

Center's web site at [www.foundationcenter.org](http://www.foundationcenter.org). Tax returns for the Foundation for most years dating back to 1995 are available at [www.guidestar.org](http://www.guidestar.org) for a nominal \$100 registration fee. Attached as **Exhibit N** is a true and correct copy of the public filing of The Andy Warhol Foundation for the Visual Arts, Inc., the Internal Revenue Service Form 990-PF, for the fiscal year ending April 30, 2006, which is cited by Plaintiff in paragraphs 55 and 58 of the Amended Complaint. This filing includes the following statements:

- a. 113 grants awarded to support the visual arts, totaling \$7,985,854, plus five grants totaling \$65,000 to foreign and private foundations. (Statement 25, a schedule listing all grants and the amounts). Such grants include \$250,000 to The Andy Warhol Museum.
- b. Disclosure of compensation for board members, officers, most highly paid employees, and most highly paid consultants.
- c. A number of expenses particular to the Foundation's mission and programs, including \$409,727 on "art storage and related exp."; \$397,103 on "curator and conservation exp."; \$212,276 on insurance; and \$18,100 on the catalogues raisonn  . (Statement 8).
- d. Disbursements for charitable purposes of \$9,913,449 (line 26, column d), which total is comprised of \$1,927,595 in administrative expenses (line 24, column d) and \$7,985,854 in grants (line 25, column d).

16. Attached as **Exhibit O** are excerpts from IRS Form 990-PFs evidencing in the Foundation's assets — excluding artwork owned by the Foundation — of nearly \$100 million in the year ending April 30, 2001 and over \$135 million in the year ending April 30, 2003

(subtracting the fair market value of the Foundation's artworks listed as "other assets" at page 2, line 15, col. c, from "total assets," listed at page 2, line 16, col. c).

17. Attached as **Exhibit P** are excerpts from IRS Form 990-PFs for fiscal years ending April 30, 1989 through 2004 evidencing numerous other gifts of artwork by the Foundation in the amount of \$78,438,080. Such gifts include outright gifts and sales through the "Museum Sales Program," which sells works to selected museum "at a price equal to one half or less of the Foundation's book value for that work" plus a "qualified grant" for the balance, with grantees selected based on location, collections, resources, and the "opportunity of making the art available to wide or new audiences." Such gifts include:

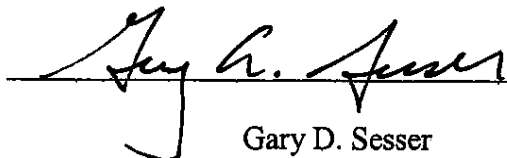
- a. Gifts of artwork and film and video to The Andy Warhol Museum in fiscal years 1998, 1999, 2001, and 2002, totaling more than \$67 million.
- b. Approximately 93 works sold through the Museum Sales Program in fiscal years 1994, 1995, and 1996, with grants totaling more than \$2.5 million.

18. Attached as **Exhibit Q** is the letter from the Board to Simon dated September 15, 2003, that sets forth the reasons for the Board's decision with respect to the *Dollar Bills* collage submitted by Simon and referred to in the *Vanity Fair* article cited in paragraphs 22, 80, 82, 86, and 167 of the Amended Complaint.

Declaration pursuant to 28 U.S.C. §1746.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2007.

  
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Gary D. Sesser